MALCOLM W. MONROE
Departmental Editor

Case Comments

Decisions of International and Foreign Tribunals

International Court of Justice

India v. Pakistan

On August 18, 1972, the International Court of Justice delivered its Judgment in the *Appeal relating to the Jurisdiction of the ICAO Council (India v. Pakistan).*

By a vote of thirteen to three, the Court rejected Pakistan's objections on the question of its competence and found that it had jurisdiction to entertain India's appeal.

It also held (fourteen to two) the Council of the International Civil Aviation Organization to be competent to entertain the Application and Complaint laid before it by the Government of Pakistan on March 3, 1971, and rejected the appeal made to the Court by the Government of India against the decision of the Council assuming jurisdiction in those respects.

ANALYSIS OF THE JUDGMENT

The Facts and the main contentions of the parties (paragraphs 1-12 of the Judgment). The Court has emphasized in its Judgment that it had nothing whatever to do with the facts and contentions of the Parties relative to the substance of the dispute between them, except in so far as those elements might relate to the purely jurisdictional issue which alone had been referred to it.

Under the International Civil Aviation Convention and the International Air Services Transit Agreement, both signed in Chicago in 1944, the civil

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Malcolm W. Monroe holds a B.A. (1940) and LL.B. (1942), Tulane University; member, American, Inter-American, Louisiana State, New Orleans (member, Executive Committee), and Federal Bar Associations, American Judicature Society and Maritime Law Association; president (1972-), New Orleans, Chapter, Federal Bar Association; president (1957-1959), Phi Delta Phi International Legal Fraternity.

aircraft of Pakistan had the right to overfly Indian territory. Hostilities interrupting overflights broke out between the two countries in August 1965, but in February 1966 they came to an agreement that there should be an immediate resumption of overflights on the same basis as before 1 August 1965. Pakistan interpreted that undertaking as meaning that overflights would be resumed on the basis of the Convention and Transit Agreement, but India maintained that those two Treaties had been suspended during the hostilities and were never as such revived, and that overflights were resumed on the basis of a special régime according to which they could take place only after permission had been granted by India. Pakistan denied that any such régime ever came into existence and maintained that the Treaties had never ceased to be applicable since 1966.

On 4 February 1971, following a hijacking incident involving the diversion of an Indian aircraft to Pakistan, India suspended overflights of its territory by Pakistan civil aircraft. On 3 March 1971 Pakistan, alleging that India was in breach of the two Treaties, submitted to the ICAO Council

(a) an Application under Article 84 of the Chicago Convention and Article II, Section 2, of the Transit Agreement;
(b) a Complaint under Article II, Section 1, of the Transit Agreement. India having raised preliminary objections to its jurisdiction, the Council declared itself competent by decisions given on 29 July 1971. On 30 August 1971 India appealed from those decisions, founding its right to do so and the Court's jurisdiction to entertain the appeal on Article 84 of the Chicago Convention and Article II, Section 2, of the Transit Agreement (hereinafter called "the jurisdictional clauses of the Treaties").

Jurisdiction of the Court to entertain the Appeal (paragraphs 13-26 of the Judgment). Pakistan advanced certain objections to the jurisdiction of the Court to entertain the appeal. India pointed out that Pakistan had not raised those objections as *preliminary* objections under Article 62 of the Rules, but the Court observes that it must always satisfy itself that it has jurisdiction and, if necessary, go into that matter *proprio motu*. Pakistan had argued in the first place that India was precluded from affirming the competence of the Court by its contention, on the merits of the dispute, that the Treaties were not in force, which if correct, would entail the inapplicability of their jurisdictional clauses. The Court, however, has held that Pakistan's argument hereon was not well founded, for the following reasons:

(a) India had not said that these multilateral Treaties were not in force in the definitive sense, but that they had been suspended or were not as a matter of fact being applied as between India and Pakistan;
(b) a merely unilateral suspension of a treaty could not per se render its jurisdictional clause inoperative;

(c) the question of the Court's jurisdiction could not be governed by preclusive considerations;

(c) the question of the Court's jurisdiction could not be governed by preclusive considerations;

(d) parties must be free to invoke jurisdictional clauses without being made to run the risk of destroying their case on the merits.

Pakistan had further asserted that the jurisdictional clauses of the Treaties made provision solely for an appeal to the Court against a final decision of the Council on the merits of disputes, and not for an appeal against decisions of an interim or preliminary nature. The Court considers that a decision of the Council on its Jurisdiction does not come within the same category as procedural or interlocutory decisions concerning time-lights, the production of documents etc., for

(a) although a decision on jurisdiction does not decide the ultimate merits, it is nevertheless a decision of a substantive character, inasmuch as it might decide the whole case by bringing it to an end;

(b) an objection to jurisdiction has the significance *inter alia* of affording one of the parties the possibility of avoiding a hearing on the merits;

(c) a jurisdictional decision may often involve some consideration of the merits;

(d) issues of jurisdiction can be as important and complicated as any that might arise on the merits;

(e) to allow an international organ to examine the merits of a dispute when its competence to do so has not been established would be contrary to accepted standards of the good administration of justice.

With regard more particularly to its Complaint to the ICAO Council, Pakistan had submitted that it was relying on Article II, Section 1, of the Transit Agreement (whereas the Application relied on Article 84 of the Chicago Convention and on Article II of Section 2 of the Transit Agreement). The point here was that decisions taken by the Council on the basis of Article II, Section 1, are not appealable, because, unlike decisions taken under the other two provisions mentioned above, they do not concern illegal action or breaches of treaty but action lawful, yet prejudicial. The Court found that the actual Complaint of Pakistan did not, at least for the most part, relate to the kind of situation for which Section 1 of Article II was primarily intended, inasmuch as the injustice and hardship alleged therein were such as resulted from action said to be illegal because in breach of the Treaties. As the Complaint made exactly the same charges of breach of the Treaties as the Application, it could be assimilated to the latter for the purposes of appealability: unless that were so, paradoxical situations might arise.

To sum up, the objections to the Court's jurisdiction based on the

alleged inapplicability of the Treaties as such or of their jurisdictional clauses could not be sustained. The Court was therefore invested with jurisdiction under those clauses and it became irrelevant to consider objections to other possible bases of the Court's jurisdiction.

Furthermore, since it was the first time any matter had come to the Court on appeal, the Court observed that in thus providing for an appeal to the Court from the decisions of the ICAO Council, the Treaties had enabled a certain measure of supervision by the Court of the validity of the Council's acts and that, from that standpoint, there was no ground for distinguishing between supervision as to jurisdiction and supervision as to merits.

Jurisdiction of the ICAO Council to entertain the merits of the case (paragraphs 27–45 of the Judgment). With regard to the correctness of the decisions given by the Council on 29 July 1971, the question was whether Pakistan's case before the Council disclosed, within the meaning of the jurisdictional clauses of the Treaties, a disagreement relating to the interpretation or application of one or more provisions of those instruments. If so, the Council was prima facie competent, whether considerations claimed to lie outside the Treaties might be involved or not.

India had sought to maintain that the dispute could be resolved without any reference to the Treaties and therefore lay outside the competence of the Council. It had contended that the Treaties had never been revived since 1965 and that India had in any case been entitled to terminate or suspend them as from 1971 by reason of a material breach of them for which Pakistan was responsible, arising out of the hijacking incident. India had further argued that the jurisdictional clauses of the Treaties allowed the Council to entertain only disagreements relating to the interpretation and application of those instruments, whereas the present case concerned their termination or suspension. The Court found that, although those contentions clearly belonged to the merits of the dispute,

(a) such notices or communications as there had been on the part of India from 1965–1971 appeared to have related to overflights rather than to the Treaties as such;

(b) India did not appear ever to have indicated which particular provisions of the Treaties were alleged to have been breached;

(c) the justification given by India for the suspension of the Treaties in 1971 was said to lie not in the provisions of the Treaties themselves but in a principle of general international law, or of international treaty law. Furthermore, mere unilateral affirmation of those contentions, contested by the other party, could not be utilized so as to negative the Council's jurisdiction.

Turning to the positive aspects of the question, the Court found that

Pakistan's claim disclosed the existence of a disagreement relating to the interpretation or application of the Treaties and that India's defences likewise involved questions of their interpretation or application. In the first place, Pakistan had cited specific provisions of the Treaties as having been infringed by India's denial of overflight rights, while India had made charges of a material breach of the Convention by Pakistan: in order to determine the validity of those charges and counter-charges, the Council would inevitably be obliged to interpret or apply the Treaties. In the second place, India had claimed that the Treaties had been replaced by a special régime, but it seemed clear that Articles 82 and 83 of the Chicago Convention (relating to the abrogation of inconsistent arrangements and the registration of new agreements) must be involved whenever certain parties purported to replace the Convention or some part of it by other arrangements made between themselves; it followed that any special régime, or any disagreement concerning its existence, would raise issues concerning the interpretation or application of those articles. Finally Pakistan had argued that, if India maintained the contention which formed the substratum of its entire position, namely that the Treaties were terminated or suspended between the Parties, then such matters were regulated by Articles 89 and 95 of the Chicago Convention and Articles I and III of the Transit Agreement; but the two Parties had divergent interpretations of those provisions, which related to war and emergency conditions and to the denunciation of the Treaties.

The Court concluded that the Council was invested with jurisdiction in the case and that the Court was not called upon to define further the exact extent of that jurisdiction, beyond what it had already indicated.

It had further been argued on behalf of India, though denied by Pakistan, that the Council's decisions assuming jurisdiction in the case had been vitiated by various procedural irregularities and that the Court should accordingly declare them null and void and send the case back to the Council for re-decision. The Court considered that the alleged irregularities, even supposing they were proved, did not prejudice in any fundamental way the requirements of a just procedure, and that whether the Council had jurisdiction was an objective question of law, the answer to which could not depend on what had occurred before the Council.

Declarations and separate or dissenting opinions. Judge Morozov and Judge ad hoc Nagendra Singh (Dissenting Opinions) were unable to concur in the Court's decision on the jurisdiction of the ICAO Council.

President Sir Muhammad Zafrulla Khan (Declaration) and Judges Petrén and Onyeama (Separate Opinions) were unable to concur in the Court's decision on its own jurisdiction.

Judge Jiménez de Aréchaga (Separate Opinion) concurred in the operative clause of the Judgment but did not approve the Court's conclusion as to its jurisdiction to hear an appeal from the Council's decision on the Complaint of Pakistan, as distinct from its Application.

Judges Lachs (Declaration), Dillard and de Castro (Separate Opinions) added further observations.

Election of Five Members of the Court

Judges Isaac Forster (Senegal) and André Gros (France) have been re-elected, and Sir Humphrey Waldock (United Kingdom) and Messrs. Nagendra Singh (India) and José Maria Ruda (Argentina) have been elected, as Members of the International Court of Justice.

These judges were elected by the United Nations General Assembly and Security Council on 30 October 1972, and the Secretary-General of the United Nations immediately communicated the results of the election to the President of the Court. They will hold office for nine years from 6 February 1973, on which date the three newly-elected judges will take up their duties.

The three outgoing judges are President Sir Muhammad Safrulla Kahn (Pakistan), and Judges Sir Gerald Fitzmaurice (United Kingdom) and Luis Padilla Nervo (Mexico).

Fisheries Jurisdiction Cases

(United Kingdom v. Iceland: Federal Republic of Germany v. Iceland)

On August 17, 1972, the International Court of Justice issued two Orders, each adopted by fourteen votes to one, indicating interim measures of protection in the *Fisheries Jurisdiction* cases:

United Kingdom v. Iceland[1]

In the first of the two Orders, the Court indicates, pending its final decision in the proceedings instituted on April 14, 1972 by the Government of the United Kingdom against the Goverment of Iceland, the following provisional measures:

1. the United Kingdom and the Republic of Iceland should each ensure that no action of any kind is taken which might aggravate or extend the dispute submitted to the Court;
2. the United Kingdom and the Republic of Iceland should each ensure that no action is taken which might prejudice the rights of the other party in

[1]*See also* 6 INT'L LAW. 665 (July, 1972) and 889-95 (Oct., 1972).

respect of the carrying out of whatever decision on the merits the Court may render;

3. the Republic of Iceland should refrain from taking any measures to enforce the regulations of July 14, 1972 against vessels registered in the United Kingdom and engaged in fishing activities in the waters around Iceland outside the twelve-mile fishery zone;
4. the Republic of Iceland should refrain from applying administrative, judicial or other measures against ships registered in the United Kingdom, their crews or other related persons, because of their having engaged in fishing activities in the waters around Iceland outside the twelve-mile fishery zone;
5. the United Kingdom should ensure that vessels registered in the United Kingdom do not take an annual catch of more than 170,000 metric tons of fish from the "Sea Area of Iceland" as defined by the International Council for the Exploration of the Sea as area Vä; and
6. the United Kingdom Government should furnish the Government of Iceland and the Registry of the Court with all relevant information, orders issued and arrangement made concerning the control and regulation of fish catches in the area.

Federal Republic of Germany v. Iceland[2]

In the second Order, the Court indicates, pending the final decision in the proceedings instituted on June 5, 1972 by the Federal Republic of Germany against Iceland the following provisional measures:

The first five paragraphs of the second Order are in the same form, *mutatis mutandis,* as in the first Order; and the sixth paragraph reads as follows:

6. the Federal Republic should ensure that vessels registered in the Federal Republic do not take an annual catch of more than 119,000 metric tons of fish from the "Sea Area of Iceland" as defined by the International Council for the Exploration of the Sea as area Vä;

Unless the Court has meanwhile delivered its final judgment in the cases, it shall, at an appropriate time before August 15, 1973, review the matter at the request of any part in order to decide whether the foregoing measures shall continue or need to be modified or revoked.

Chile[3]

In December 0f 1971, appeals were filed by Anaconda, Kennecott and Cerro Corporation, the three private United States copper companies whose assets were expropriated in 1971 with a Constitutional Amendment

[2]*See* 6 INT'L LAW. 889-95 (Oct., 1972).

[3]*See also* Lillich, *International Law and the Chilean Nationalizations: The Valuation of the Copper Companies, supra* note p. 126; and Lowenfeld, *Reflections on Expropriation and the Future of Investment in the Americas, supra,* p. 118.

unanimously approved by the National Congress, seeking relief from the decision of the Comptroller General of the Republic on the question of compensation for the nationalization of their holdings.

On Appeal, Anaconda and Kennecott urged, in part, review of the excess-profits deduction applicable only to Anaconda and Kennecott. Both corporations requested the Special Copper Tribunal to decide as to its own jurisdiction on this item, before taking cognizance of the other aspects of the appeal. On August 11, 1972, the Tribunal decided, by a vote of four to one, that it does not have jurisdiction over the question of excess profits.

On September 7, 1972, Kennecott Copper Company, former owner of 49 percent of the stock of Sociedad Minera El Teniente S.A., announced in New York, that "once the legal remedies in Chile are exhausted, it would continue the defense of its interests in other countries of the world," and that the company was placing all persons who may be concerned on notice that it still has rights to the copper produced by El Teniente and that it would adopt whatever measures it deemed necessary to protect such rights in the copper or its proceeds.

In a press release issued in New York on September 12, 1972, Chilean Copper Corporation (CODELCO) stated that Kennecott's attitude represents a new expression of disrespect on the part of the company towards the sovereign faculty of the Government of Chile by which copper was nationalized. CODELCO's communique added that "this claim openly contradicts Kennecott's attitude in Chile when litigating for more than one year before the Chilean Courts and is juridicially and morally inacceptable to any Court in the world."

CODELCO further charged that "the absurd threat directed by Kennecott to the buyers of Chilean copper constitutes an open aggression intended to create uncertainty among Chile's usual customers, to cause immediate economic damage to the country and to obstruct the normal flow of its foreign trade."

Kennecott dispatched letters to the usual buyers of Chilean copper, warning as to its ability to embargo 49 percent of the metal that they may purchase, while CODELCO in its turn informed its customers that the company's threats were illegal.

There was a strong reaction from all political sectors of Chile, from left to right, to Kennecott's statement and the Senate and the Chamber of Deputies unanimously condemned the action, and the press, representing different currents of opinion, repudiated it as an attempt against Chile's sovereignity.